

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 33636

MELVIN A. McCABE,	)	2008 Unpublished Opinion No. 549
	)	
Petitioner-Appellant,	)	Filed: July 14, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fifth Judicial District, State of Idaho, Jerome County. Hon. John K. Butler, District Judge.

Order summarily dismissing petition for post-conviction relief, affirmed in part and reversed in part, and case remanded.

Nevin, Benjamin, McKay & Bartlett; Dennis A. Benjamin, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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GUTIERREZ, Chief Judge

Melvin A. McCabe appeals from the summary dismissal of his petition for post-conviction relief. We affirm in part, reverse in part, and remand for an evidentiary hearing.

I.

BACKGROUND

McCabe was initially charged with first degree arson, Idaho Code § 18-802, for setting fire to his estranged wife's residence. The state also alleged that McCabe was subject to a sentencing enhancement as a persistent violator, I.C. § 19-2514. The jury trial that followed ended in a mistrial due to a hung jury. Thereafter, the parties arrived at a plea agreement in which McCabe agreed to plead guilty to the reduced charge of felony malicious injury to property, I.C. § 18-7001, and to pay restitution. In return, the state dismissed the persistent violator enhancement and agreed to recommend that McCabe's sentence run concurrently with

the sentence in a Bannock County case. The plea agreement was conditional, with McCabe initially reserving the right to appeal three issues, although McCabe withdrew one of the issues during the plea hearing.

The district court imposed a determinate five-year sentence and ordered that it run concurrent with the sentence imposed in a Bannock County case, but the court also suspended the sentence and placed McCabe on probation for five years.<sup>1</sup> One year later, McCabe's probation was revoked and his sentence was modified to a unified five-year term, with three years determinate. He thereupon filed a *pro se* petition for post-conviction relief, raising two claims of ineffective assistance of counsel and one claim challenging the constitutional validity of his guilty plea. The district court issued a notice of intent to dismiss, to which McCabe responded with an affidavit further supporting his original petition. McCabe also raised four new claims for post-conviction relief in his response. The district court summarily dismissed McCabe's petition, addressing only those claims raised in the initial petition for post-conviction relief. Several days later, McCabe filed a motion to amend his petition to include the claims raised in his response. The district court denied this motion, at which point McCabe filed a motion to reconsider referencing in a footnote his prior request for counsel. The district court denied the motion to reconsider, on the basis that a *pro se* petitioner is held to the same standard as an attorney, and therefore McCabe's failure to follow the proper procedures for amending a petition supported the court's denial of his motion to amend. McCabe subsequently filed a notice of appeal and request for appointment of counsel.

## II.

### DISCUSSION

McCabe raises three issues on appeal. First, he contends the district court erred when it summarily dismissed his petition for post-conviction relief without first ruling on his motion for appointment of counsel. Second, he asserts that the district court improperly applied precedent and erred by failing to consider the claims raised in his response to the court's notice of intent to dismiss. Finally, McCabe challenges the district court's summary dismissal of the three claims raised in his initial petition for post-conviction relief.

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<sup>1</sup> McCabe's judgment of conviction was affirmed in an unpublished opinion, *State v. McCabe*, Docket No. 32066 (Ct. App. April 10, 2007).

**A. Motion for Appointment of Counsel**

McCabe's first assertion of error is that the district court failed to rule on a request for appointment of counsel prior to ruling on any of the substantive issues raised in his petition for post-conviction relief. If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111. The district court abuses its discretion where it fails to determine whether an applicant for post-conviction relief is entitled to court-appointed counsel before denying the application on the merits. *See Id.* at 793, 102 P.3d at 1112.

The first mention of McCabe's alleged request for appointment of counsel comes in the form of a footnote in his motion to reconsider the district court's order denying his motion to amend. The record itself does not contain a motion for appointment of counsel, nor does it contain the cover-letter to the initial petition for post-conviction relief which is purported to contain the request for counsel. It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. *State v. Murinko*, 108 Idaho 872, 873, 702 P.2d 910, 911 (Ct. App. 1985). In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error. *State v. Beason*, 119 Idaho 103, 105, 803 P.2d 1009, 1011 (Ct. App. 1991).

**B. Issues Raised in Response to the Notice of Intent to Dismiss**

The district court relied on *Cowger v. State*, 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999), when it refused to consider the claims raised by McCabe in his response to the court's notice of intent to dismiss. McCabe posits that the district court misapplied *Cowger* and should have appointed counsel *sua sponte* and allowed time for the filing of an amended petition.

As with McCabe, Cowger, acting *pro se*, raised new claims in response to a notice of intent to dismiss. The district court attempted to address these new claims in its order summarily

dismissing Cowger's petition, and Cowger pursued the claims on appeal to this Court. We held that:

The procedure contemplated by the Uniform Post-Conviction Procedure Act does not permit new allegations to be raised in response to a notice of intent to dismiss. The applicant, upon discovering additional claims, should amend his or her application and renew his or her motion for court-appointed counsel based upon the new allegations. To allow additional claims to be raised in the response to the district court's notice of intent to dismiss would require that the district court issue a further notice of intent to dismiss as to those claims in order to give the applicant an opportunity to respond to the court's reasons for dismissing the new claims within the time statutorily provided. Conceivably, the post-conviction process could go on indefinitely because the applicant may simply raise a new issue in each response to a notice of intent to dismiss in order to circumvent its dismissal. An applicant's "response" then, would be encouraged to be nonresponsive. Thus, we are constrained to conclude that an applicant must file an amended application when he or she desires to raise additional issues in a post-conviction case. See I.C. § 19-4906(b).

*Cowger*, 132 Idaho at 686-87, 978 P.2d at 246-47. Cowger's new claims were not reviewed on appeal, although we conceded that in a situation such as Cowger's, "it may be appropriate for the district court to *sua sponte* reconsider its denial of the applicant's motion for court-appointed counsel and, upon appointment, allow counsel to review the matter for the filing of an amended application." *Id.* at 687, 978 P.2d at 247. This last statement, upon which McCabe bases his argument, is advisory only and not grounds for reversing the order of the district court in this case. As discussed above, there is nothing in the record to indicate that a request for counsel existed which the court could spontaneously reconsider and grant. What *Cowger* makes clear, however, is that new claims raised in response to a notice of intent to dismiss, instead of in an amended petition, are not properly before the district court. *Id.*

McCabe argues that the district court's adherence to *Cowger* and refusal to consider his new claims results in a deprivation of his constitutional right of access to the courts. "It is now established beyond doubt that prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977), limited by *Lewis v. Casey*, 518 U.S. 343, 350-51 (1996); *Madison v. Craven*, 141 Idaho 45, 48, 105 P.3d 705, 708 (Ct. App. 2005). That access must be adequate, effective, and meaningful. *Madison*, 141 Idaho at 48, 105 P.3d at 708. Access can be provided through adequate law libraries or assistance from persons trained in the law, although these are not the exclusive means of providing access to the courts. *Bounds*, 430 U.S. at 828-30. McCabe asserts that he was not aware of the technical pleading requirement of

the Uniform Post Conviction Procedure Act (UPCPA) or the proper procedures for filing an amended petition. If he had known about those rules, he “obviously” would have adhered to them. He further argues that the fact that he didn’t follow these rules makes it clear that he didn’t have adequate access to legal materials. His conclusion is that he was entitled to an attorney to pursue the new claims due to the obvious deficiency in the prison law library. We disagree. First, McCabe had the opportunity to include these same claims in his original petition, but simply omitted them. It was his own oversight, not something done by the state, that caused his failure to present the claims in a timely manner. Second, McCabe is in error as to what is required to satisfy the constitutional right of access to the courts. Although the United States Supreme Court encouraged the provision of an adequate law library or assistance from those trained in the law, it expressly left the door open for the states to experiment with other ways to provide access to the courts. *Id.* at 830; *see also Lewis*, 518 U.S. at 350-51; *State v. Brandt*, 135 Idaho 205, 207, 16 P.3d 302, 304 (Ct. App. 2000). Furthermore, McCabe is not entitled to an attorney as a right for a post-conviction petition. I.C. § 19-4904.

As the state points out, McCabe cited to the Idaho Code in his petition and sworn declaration and used case law to bolster his points. McCabe also complied with the pleading requirements of the UPCPA. Although McCabe claims that his reference to a few cases and code sections is not enough to show adequate access to legal materials, he has failed to show that he lacked access to the UPCPA or to the rules of civil procedure. In this instance, the fact that the additional claims asserted in McCabe’s response to the district court’s notice of intent to dismiss were not addressed does not amount to a denial of his right of access to the courts. The district court did not err by refusing to consider McCabe’s additional claims raised in response to the notice of intent to dismiss.

### **C. Summary Dismissal of Post-Conviction Claims**

McCabe’s final argument is that the district court erred by summarily dismissing the claims raised in his initial petition for post-conviction relief. He asserts that the district court made improper conclusions regarding disputed issues of material fact instead of holding an evidentiary hearing as was required. McCabe raised three claims in his petition, two alleging

ineffective assistance of counsel<sup>2</sup> and one challenging the constitutional validity of his guilty plea. An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983), *superseded by statute as stated in State v. Blume*, 113 Idaho 224, 743 P.2d 92 (Ct. App. 1987); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969), *abrogation recognized by State v. Gardner*, 126 Idaho 428, 885 P.2d 1144 (Ct. App. 1994); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). As with a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than “a short and plain statement of the claim” that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary disposition of an application for post-conviction relief, either pursuant to the motion of a party or upon the court’s own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant’s evidence has raised no genuine issue of material fact which, if resolved in the applicant’s favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct.

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<sup>2</sup> McCabe references a third ineffective assistance of counsel claim in his appellate brief -- his attorney’s failure to appeal from the denial of his Rule 35 motion. However, this claim was not raised before the district court until McCabe’s response to the notice of intent to dismiss. Therefore, the district court did not consider this claim as part of the post-conviction petition, and it will not be reviewed on appeal. *See Cowger v. State*, 132 Idaho 681, 687, 978 P.2d 241, 247 (Ct. App. 1999) (An applicant must file an amended application when desiring to raise additional issues in a post-conviction case.).

App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

#### **1. Ineffective assistance of counsel**

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray*, 121 Idaho at 924-25, 828 P.2d at 1329-30. To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id.* at 761, 760 P.2d at 1177. This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

McCabe's first claim of ineffective assistance of counsel is that his trial attorney failed to adequately advise him prior to entry of the guilty plea to malicious injury to property.<sup>3</sup>

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<sup>3</sup> On appeal, McCabe asserts that this claim was not related to whether counsel was ineffective with regard to his guilty plea, but rather whether counsel was ineffective in his preparation and failure to object to the faulty jury instruction or the declaration of a mistrial.

Specifically, McCabe asserts that his attorney's failure to object to a faulty jury instruction led to the hung jury and mistrial, and the fact that he was not informed by his attorney that a faulty instruction was given rendered his plea unintelligent and involuntary.<sup>4</sup> This claim rests on the premise that the mistrial was a direct result of the faulty jury instruction. When it is asserted that a guilty plea was the product of ineffective assistance, to prove the prejudice prong the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Martinez v. State*, 143 Idaho 789, 795, 152 P.3d 1237, 1243 (Ct. App. 2007). McCabe asserted in his petition that, had he known of the faulty jury instruction, he would have insisted on the appointment of a different attorney prior to proceeding any further, including the decision whether to plead guilty or proceed to a second trial. He does not assert that he would have insisted on a second trial instead of pleading guilty to a reduced charge, or even raise facts which could be developed to show such insistence. Since McCabe did not allege facts sufficient to show prejudice, there was no dispute of material facts as to this claim. Therefore the district court did not err by summarily dismissing it.

McCabe's second claim of ineffective assistance is that both his trial attorney and appellate counsel were ineffective for refusing to assist him in filing a motion to withdraw his guilty plea after appellate counsel initially refused to raise claims on direct appeal that were expressly reserved in his conditional guilty plea.<sup>5</sup> McCabe's guilty plea was conditioned on the right to appeal the district court's determination that the constitutional guarantee against double jeopardy did not preclude a new trial after the first arson trial ended in a mistrial, and the state's failure to preserve evidence, even though there were no adverse evidentiary rulings identified. The State Appellate Public Defender (SAPD) was initially appointed to assist McCabe in his

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However, McCabe's petition asserts that his plea was unconstitutional as a result of counsel's failures with regard to the jury instruction, and the district court dismissed the claim after framing it in terms of the voluntariness of the plea.

<sup>4</sup> McCabe also claims that but for the faulty jury instruction, he would have been acquitted --an unsupported assumption at best. Even if McCabe's trial attorney was ineffective in failing to object to the instruction, the remedy would be a new trial, not a judgment of acquittal.

<sup>5</sup> McCabe's underlying original case record and transcript are part of the record on appeal.

direct appeal. After that office filed a brief challenging only his sentence, McCabe lobbied both his trial attorney and appellate counsel to file a motion to withdraw his guilty plea. He also insisted that appellate counsel raise the issues preserved for appeal. McCabe's appellate counsel initially declined, viewing the claims as frivolous. McCabe then insisted that his appellate attorney had breached the plea agreement, and therefore needed to file a motion to withdraw his guilty plea. The SAPD's office is not authorized to practice in the district courts except in capital cases, *see* I.C. § 19-870(1). Therefore it could not file such a motion, and McCabe's trial attorney had already been relieved from representation. Therefore no motion to withdraw his guilty plea was ever filed.

In a post-conviction proceeding challenging an attorney's failure to pursue a motion in the underlying criminal action, the district court may consider the probability of success of the motion in question in determining whether the attorney's inactivity constituted incompetent performance. *Boman v. State*, 129 Idaho 520, 526, 927 P.2d 910, 916 (Ct. App. 1996). Where the alleged deficiency is counsel's failure to file a motion, a conclusion that the motion, if pursued, would not have been granted by the trial court, is generally determinative of both prongs of the *Strickland* test. *Id.*

Idaho Criminal Rule 33(c) governs the withdrawal of guilty pleas.<sup>6</sup> The granting or denial of such a motion is within the discretion of the trial court. *State v. Rodriguez*, 118 Idaho 957, 959, 801 P.2d 1308, 1310 (Ct. App. 1990). After sentencing, a defendant may only withdraw his guilty plea if he can show a manifest injustice. I.C.R. 33(c). Ordinarily, a plea knowingly, intelligently and voluntarily entered may not be withdrawn after sentencing. *State v. Simons*, 112 Idaho 254, 256, 731 P.2d 797, 799 (Ct. App. 1987). However, a breach of the plea agreement by the state affects the voluntariness of the guilty plea and is fundamental error. *State v. Banuelos*, 124 Idaho 569, 575, 861 P.2d 1234, 1240 (Ct. App. 1993).

Here, the SAPD reconsidered McCabe's arguments and sought leave to file amended briefs on direct appeal. Although the request was granted, it appears that McCabe elected to proceed *pro se* at that point. By seeking leave to file amended briefing to raise the issues

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<sup>6</sup> Idaho Criminal Rule 33(c) states in full:  
**Withdrawal of plea of guilty.** A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea.

preserved for appeal, the SAPD effectively eliminated any grounds for withdrawal of McCabe's guilty plea. Because a motion to withdraw the guilty plea, filed by either trial or appellate counsel, would have failed, it was not ineffective assistance for either attorney to refuse to file the motion.

The district court did not err in summarily dismissing the two ineffective assistance of counsel claims because there were no issues of material fact in either of the claims that required an evidentiary hearing.

## **2. Constitutional validity of McCabe's guilty plea**

The third claim raised in McCabe's petition for post-conviction relief is that his guilty plea was not constitutionally valid. McCabe declares that he was not informed he was waiving his right to present evidence on the value of the damage caused by the fire that he set in order to distinguish between a felony and a misdemeanor conviction for malicious injury to property. Because several important constitutional rights are waived when a defendant pleads guilty to a crime, a guilty plea will not be deemed valid unless it was made voluntarily, knowingly and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *Workman v. State*, 144 Idaho 518, 527, 164 P.3d 798, 807 (2007); *State v. Heredia*, 144 Idaho 95, 97, 156 P.3d 1193, 1195 (2007). A plea of guilty waives the right against compulsory self-incrimination, the right to trial by jury, and the right to confront witnesses presented against the defendant. I.C.R. 11(c). The validity of a plea is determined by considering all the relevant circumstances surrounding the plea as contained in the record. *State v. Hawkins*, 117 Idaho 285, 288, 787 P.2d 271, 274 (1990); *State v. Colyer*, 98 Idaho 32, 34, 557 P.2d 626, 628 (1976). Whether a plea is voluntary and understood entails inquiry into three areas: (1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial; and (3) whether the defendant understood the consequences of pleading guilty. *Workman*, 144 Idaho at 527, 164 P.3d at 807; *Colyer*, 98 Idaho at 34, 557 P.2d at 628.

During the plea colloquy, the district court read the third amended information into the record, and McCabe agreed that it accurately reflected the negotiated charge. The record also reflects that McCabe understood he was waiving his right to present evidence in his defense, and to challenge all of the state's evidence. McCabe appears to assert that he did not understand that the value of the damage caused to the property was a material element that the state would be

required to prove and that he was waiving the right to challenge the actual value of the damage done. Malicious injury to property is codified at I.C. § 18-7001, which states in pertinent part that:

Every person who maliciously injures or destroys any real or personal property not his own . . . is guilty of a misdemeanor and shall be punishable by imprisonment in the county jail for up to one (1) year or a fine of not more than one thousand dollars (\$1,000), or both, unless the damages caused by a violation of this section exceed one thousand dollars (\$1,000) in value, in which case such person is guilty of a felony, and shall be punishable by imprisonment in the state prison for not less than one (1) year nor more than five (5) years, and may be fined not more than one thousand dollars (\$1,000), or by both such fine and imprisonment.

The value of damage is a material element of the crime of felony malicious injury to property.<sup>7</sup> See Idaho Criminal Jury Instruction 1301.

In *State v. Salazar-Garcia*, \_\_ Idaho \_\_, 183 P.3d 778 (Ct. App. 2008), this Court addressed a claim similar to McCabe's. Salazar-Garcia moved to withdraw his guilty plea to the charge of grand theft because he did not understand at the time he pled guilty that the state would have to prove that the value of the stolen calf exceeded \$150 in order to convict him. At the preliminary hearing, defense counsel argued that the value element applied to livestock, but the magistrate rejected this view. Salazar-Garcia was bound over to district court on a complaint that did not specify the value of the property stolen. At the subsequent change of plea hearing, the district court did not explain that a value exceeding \$150 was an element of grand theft, and subsequently denied Salazar-Garcia's motion to withdraw his guilty plea, affirming the magistrate's interpretation of the grand theft statute. This Court held that the value element does apply to livestock, and Salazar-Garcia's plea was not constitutionally valid because none of the parties to the plea understood the essential elements of the charge. *Id.* at \_\_, 183 P.3d at 781. Salazar-Garcia was permitted to withdraw his guilty plea, despite having admitted under oath that the value of the calf exceeded \$150 during the plea colloquy. *Id.* We reasoned that Salazar-

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<sup>7</sup> The value of the damage and the manner in which it is calculated are both established by case law. McCabe cites to I.C. §§ 18-2402(11) and 19-5304(1)(c) for the proposition that value, when otherwise unproven, can only be presumed at \$1,000 or less, therefore making his conviction a misdemeanor. His reliance on these statutes is misplaced. Idaho Code Section 19-5304(1)(c) defines value for purposes of awarding restitution to crime victims, and I.C. § 18-2402(11) applies to theft crimes only. Furthermore, McCabe completely ignores *State v. Hughes*, 130 Idaho 698, 946 P.2d 1338 (Ct. App. 1997), which defined value and established a manner of measuring it in malicious injury to property cases.

Garcia's affirmative response was not a knowing admission to value because he had been actively misled to believe that the value was irrelevant, and there was no showing in the record that he had any personal knowledge of the value of the calf. *Id.*

*Salazar-Garcia* is instructive in this case. McCabe alleges that the language of the third amended information was ambiguous, and therefore he was unsure whether the value of the property was required to be greater than \$1,000, or the value of the damage to the property needed to be in excess of \$1,000. The third amended information indicated that the crime was a felony and stated that McCabe "did maliciously injure certain real property, to-wit: a dwelling located at 283 East 200 South, Jerome County, Idaho, of a value in excess of One Thousand Dollars (\$1,000), the property of [the victim], by fire." During the plea colloquy, McCabe answered several questions regarding the factual basis for his plea. However, when asked if he had "any reason to believe that the value of the property damaged was \$1,000 or more," McCabe stated that he did not. Nowhere in the record was McCabe expressly and unambiguously informed that guilt of felony injury to property requires that the property *damage* exceed \$1,000. Furthermore, McCabe denied any personal knowledge of the value of either the property or the damage.

Despite the fact that the particular crime to which McCabe pled was negotiated and a reduced charge from first degree arson, there is no evidence in the record to show that McCabe was informed of the material elements of felony malicious injury to property prior to his guilty plea. The information and plea colloquy create confusion as to the value element of the crime. Where a defendant does not know the material elements of the charge to which he is pleading, his plea cannot be knowing, voluntary, and intelligent. *Salazar-Garcia*, \_\_ Idaho at \_\_, 183 P.3d at 780. It is entirely possible that McCabe was so informed; however that cannot be determined from the record before us. Therefore the district court erred by summarily dismissing this claim in McCabe's petition for post-conviction relief. McCabe raised an issue of material fact requiring an evidentiary hearing.

### III.

### CONCLUSION

The district court did not err by summarily dismissing McCabe's post-conviction claims of ineffective assistance of counsel or by failing to consider claims raised for the first time in his response to the court's notice of intent to dismiss. The district court did err by summarily

dismissing McCabe's claim that his guilty plea was not constitutionally valid because he was not informed of the material elements of the charged crime. Thus, we affirm in part and reverse in part. The case is remanded for an evidentiary hearing on the guilty plea claim.

Judge LANSING and Judge PERRY **CONCUR.**